GENDERDOC-M V MOLDOVA
Application no. 9106/06

WRITTEN SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS AND ILGA-EUROPE

I. Introduction

These written comments are submitted by ILGA-Europe and the International Commission of Jurists pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 of the Rules of Court.[1] ILGA-Europe is a non-governmental umbrella association that represents around 300 member organizations (principally of lesbian, gay, bisexual and transgender persons) at the European level. ILGA-Europe enjoys participative status at the Council of Europe and contributes to standard setting on sexual orientation and gender identity in CoE and other European institutions. The ICJ is a non-governmental organisation working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It is made up of 60 eminent jurists representing different justice systems throughout the world and has 80 national sections and affiliated justice organisations. The ICJ has consultative status at the United Nations Economic and Social Council, the Council of Europe, and the African Union. The ICJ has developed significant expertise in the application of international human rights law to violations based on sexual orientation and gender identity.

This present case, *GENDERDOC-M v. Moldova*, concerns the Government of Moldova's denial of permission to GenderDoc-M, a non-governmental organisation representing LGBT individuals, to hold a peaceful demonstration in front of the Parliament on 27 May 2005. In both domestic litigation and submissions to this Court, the Government alleged that the refusal was based on "public order" and "public morality." The Court's Questions to the Parties concerned Articles 11 and 14 of the Convention.[2]

The issue thus presented is the relationship between what is a permissible limitation under Article 11 and what can serve to justify a difference in treatment under Article 14. Under Article 11(2), restrictions on the right to freedom of peaceful assembly and to freedom of association with others must be "prescribed by law," "necessary in a democratic society," and imposed for a certain enumerated purpose. Enumerated purposes include, among others, "the prevention of disorder" and "the protection of health or morals." Article 14 itself, which serves to guarantee that Article 11 and other Convention rights are secured without discrimination, has no limitations clause. According to the Court's case-law, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification.[3]

The Intervenors submit that the protection of morals, commonly referred to as public morality, is not and can never be an objective and reasonable justification under Article 14. Although it may at times be a permissible limitation under Article 11 and several other Articles of the Convention, public morality cannot serve to justify a distinction in treatment under the prohibition on discrimination.

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[1] Letters of the Section Registrar dated 10 and 17 May 2010.

[2] See Statement of Facts dated 26 May 2008 and 10 February 2010. In its submission dated 1 April 2010, the Government of Moldova admitted a violation of Article 11 but argued that it had not violated GenderDoc-M's rights under Article 14. See Observations du Gouvernement de la République de Moldova sur la Recevabilité et le Fond de l'Affaire at 6.

[3] *Willis v. United Kingdom*, Application no. 36042/97, Judgment dated 11 September 2002, at para. 39:

The reasons are manifold. Public morality arguments are often based on traditional and/or religious views of family and sexuality.[4] Yet conceptions of what is moral are relative and change over time.[5] Because it is so fluid, is a particularly difficult criterion for a court or legislature to apply. These characteristics militate against giving public morality an expansive effect. Moreover, when divorced from any notion of public welfare or harm, public morality, as a number of leading jurisprudential scholars have noted, may simply be another name for popular prejudice.[6] This has been especially true when it comes to the treatment of LGBT individuals and organizations. Sexual orientation and same-sex relationships are a highly contested and emotionally charged area, and public morals have become one of the battlegrounds on which this debate is played out.[7]

This Intervention first looks at the ways in which public morality, and its close cousin public disorder, are used to justify interferences with the rights of LGBT individuals and organizations. Part II.A examines the application of the public morality doctrine to matters of sexual orientation. Part II.B then reviews how public morality as a permissible limitation on freedoms of assembly, association, and expression has been read narrowly by this Court, the UN Human Rights Committee in respect of analogous provisions in the International Covenant on Civil and Political Rights, and other institutions. In Part III, we discuss the European Court and national courts' approaches to public morality and non-discrimination. We conclude that while public morality may be a permissible limitation in the exercise of some Convention rights, the popular conception of what is moral fails the test articulated by the Court of when a difference in treatment amounts to unfair discrimination.

II. Public Morality: Its Use and Misuse in Limiting Convention Rights

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[4] For the religious antecedents of public morals, see, for example, Observations of the Government of the Republic of Moldova Over the Admissibility and Merits of the Case, 15 September 2008, at paras. 5-6, 12, 17-18, 24, 27. "The morals of Moldovan population have been formed during centuries due to the Christian belief (relying on the Holy Bible). Nowadays, approximately 98% of Moldovan population may be considered Christians. Christians admit no sexual relations and marriage between people of the same gender. Being very much worried of such an attempt to the morals, the Moldovan people made a lot of requests to the Mayor's Office asking for non-authorization of an assembly which promotes such immoral values." Id. at para. 17. See also *Chisnau City Hall v. GenderDoc-M*, Plaintiff's Statement, dated 12 April 2010 (citing religious opposition as reasons for a ban based on public morality).

[5] *Hertzberg v. Finland*, Communication No. 61/1979, UN Doc. CCPR/C/OP/1 (1985), Individual Opinion of Torkel Opsahl (noting that "the conception and contents of public morals" referred to In article19 (3) are relative and changing"); Human Rights Committee, General Comment No. 22, UN Doc. CCPR/C/21/Rev.1/Add.4, at para. 8 ("The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition."); Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), at para. 27 ("Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.").

[6] Ronald Dworkin, "Lord Devlin and the Enforcement of Morals" in *Yale Law Journal*, May 1966; H.L.A. Hart, *Law, Liberty and Morality* (1963); Peter Cicchino, "Reason and the Rule of Law: Should Bare Assertions of 'Public Morality' Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?" in *Georgetown Law Journal*, October 1998.

[7] Andreas Gross, Explanatory Memorandum on Discrimination on the Basis of Sexual Orientation and Gender Identity, Council of Europe Parliamentary Assembly Doc. 12185, 23 March 2010, at para. 37 (table listing morality and danger to the traditional family as among most common prejudices).

II.A. Public Morality and Sexual Orientation: An Overview

The problematic implications for human rights protection of public morality is demonstrated by the frequency with which it is claimed as a justification for the limitation of the rights of LGBT individuals. Numerous recent reports have noted the recurrent use of "morality" as an excuse for the restriction of rights.[8] This part gives an overview of historical and recent examples in this regard.

It is important to note that protection of morality and prevention of disorder are considered together in this submission. Interferences with the right to freedom of assembly based on the prevention of disorder and the protection of morals have a common root. In both instances, the restriction is premised on the idea that there are a large number of people who object to the views held by the participants in the assembly or to the message promoted by the assembly. The audience, in other words, is hostile. Where that hostility is based on moral objections, these two grounds for restriction overlap. Authorities banning peaceful assemblies by LGBT individuals and organizations often base the interference both on the moral views of a wide section of the public and the risk of disorder that these morally opposed individuals present.[10] Thus, the prevention of disorder is effectively a subset of public morality arguments and is treated as such here.

Historically, speech about homosexuality has been the target of restrictions in the name of "public morality." In Finland, a law criminalized "publicly encourag[ing] indecent behavior between members of the same sex." This was used against journalists on radio and television programs that mentioned homosexuality and the difficulties faced by homosexuals.[11] In the United Kingdom, Section 28 of the Local Government Act 1988 prohibited local authorities from "promot[ing] homosexuality or publish[ing] material with the intention of promoting homosexuality. Local authorities were further prohibited from promoting teaching in schools of "the acceptability of homosexuality as a pretended family relationship."[12]

Although these laws in the United Kingdom and Finland are no longer in effect, similar laws do still exist. In Lithuania, the Parliament adopted a law entitled, "Law on the Protection of Minors against the Detrimental Effect of Public Information" in July 2009. The law, which was adopted over a presidential veto, prohibited information that "agitate[s] for homosexual, bisexual and polygamous relations." Following an international outcry, that provision was deleted but the new version of the law bans information which "denigrates family values" from places accessible to minors.[13] In the Russian Federation, the Constitutional Court

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[8] See EU Fundamental Rights Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II: The Social Situation*, 2009, at 47-52; Gross Explanatory Report, supra n. 6, at para. 30 (noting that people who discriminate often invoke "morality" or justifications based on public order); *Statement by Thomas Hammarberg, Council of Europe Commissioner for Human Rights Vienna, 31 October 2008,* CommDH/Speech(2008)16.

[10] FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: The Social Situation*, 2009 at 52 ("Reasons given for the bans include participant safety, the violation of public morals, and the preservation of public order."); ILGA-Europe, *Lesbian, Gay, Bisexual and Transgender Rights: Freedom of Assembly*, Working Paper, August 2008, at 5.

[11] Communication No. 61/1979, UN Doc. CCPR/C/OP/1(1985).

[12] Local Government Act 1988, Section 28.

[13] Amnesty International Public Statement, 18 March 2010.

recently upheld a law prohibiting "propaganda of homosexuality to minors." The law had been used to convict activists who demonstrated against homophobia in the city of Ryazan. The Constitutional Court found that the banning of information which could be harmful to "health" and "morals" did not violate any constitutional rights.[14]

Public morality grounds are also frequently used to justify interference with freedom of association. In Turkey, government officials have repeatedly sought to refuse registration to LGBT organizations on public morality grounds. The latest attempt occurred when the public prosecutor in Izmir filed suit to close Siyah Pembe Üçgen Izmir (Black Pink Triangle Izmir), alleging that the organization's charter violated public morality.[15] On 30 April 2010, the organization won a court ruling in its favor.[16]

Across Europe, LGBT individuals and organizations have been denied permission to hold peaceful rallies and demonstrations or have had their permits withdrawn. For example, cases involving the Russian Federation and Serbia are currently pending before this Court.[17] Gay pride events in Moscow have been banned for the last five years.[18] In the past three years, pride events have also been banned in Lithuania, Moldova, Romania, Poland, and Latvia.[19]

A number of Council of Europe organs have taken a critical view of these events, including Committee of Ministers, whose Recommendation (2010) 5 calls on member states to take appropriate measures "to prevent restrictions on the effective enjoyment of the rights of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order."[20] Parliamentary Assembly Resolution 1728, adopted this year, expressed particular concern about violation of the rights to freedom of assembly and association for LGBT persons.[21] The Commissioner for Human Rights of the Council of Europe has also noted the misuse of "morality" to restrict the freedom of association rights of LGBT individuals and organisations.[22]

II.B. How to Read Public Morality and Public Order Limitations

[14] "Russian Court: Ban of 'Gay Propaganda to Minors' Is Constitutional," 31 March 2010, at www.gayrussia.ru/en/moscowpride/news/detail.php?ID=15443.
[15] Similar attempts were made with respect to Kaos GL, Pink Life, and Lambda Istanbul. The freedom of association rights of Lambda Istanbul's members were eventually affirmed by the Supreme Court of Appeals. See *People v. Lambda Istanbul,* Court of Appeals, Decision No. 2008/5196, 29 May 2008.
[16] *Public Prosecutor v. Siyah Pembe Üçgen Izmir Association*, Sixth Court of First Instance Izmir, Judgment dated 30 April 2010.
[17] *Djordjevic v. Serbia*, Application No. 5591/10; *Alekseyev v. Russia*, Application Nos. 4916/07, 25924/08, and 14599/09.
[18] Council of Europe Commissioner for Human Rights, *Human Rights Comment: Pride events are still hindered – this violates freedom of assembly*, posted 2 June 2010.
[19] See ILGA-Europe, *Freedom of Assembly Report*; Andreas Gross, *Explanatory Memorandum: Discrimination on the basis of sexual orientation and gender identity*, Committee on Legal Affairs and Human Rights, 23 March 2010; Parliamentary Assembly Doc. 12185, at paras 57-59; *Chisnau City Hall v. GenderDoc-M*, Plaintiff's Statement, dated 12 April 2010.
[20] CoM Rec (2010)5 at para. 16. See also Congress of Local and Regional Authorities Resolution 230 (2007) on Freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons.
[21] Parliamentary Assembly Resolution 1728 (2010) on Discrimination on the basis of sexual orientation and gender identity, at para. 6.
[22] Annual Activity Report 2009, by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, CommDH(2010)8, 14 April 2010, at 3.4 (expressing concern about Russia and Turkey).

As the review above demonstrates, public morality – and public order arguments based on morality – has been used to limit the rights of LGBT people and organizations. Yet international jurisprudence, decisions from other human rights bodies, and statements of principle clearly establish that such use is often a misapplication of the public morality limitation.

First, the mere invocation of "public morality" does not remove issues from international scrutiny by human rights bodies. In *Toonen v. Australia*, the U.N. Human Rights Committee considered and rejected an argument that public morality could be used to justify Tasmania's prohibition on sodomy. If moral issues were exclusively a matter for state concern, "this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy."[23]

Likewise, in the case of *Open Door and Dublin Well Woman v. Ireland*, which concerned a law banning health care centers from providing any information about the availability of abortion services in other countries, Ireland argued that the restriction on freedom of expression was intended for the protection of morals. Ireland maintained that the "view that abortion was morally wrong was the deeply held view of the majority of people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint."[24] The Court disagreed. Discretion in matters of morals was not "unfettered and unreviewable."[25] Freedom of expression, the Court recalled, applied even to ideas "that offend, shock or disturb the State or any sector of the population."[26] The Court found a violation of Article 10.

Second, the requirements of democratic societies are such that public morality and related prevention of disorder grounds must be narrowly construed and applied. This is most evident in the jurisprudence of this Court concerning freedom of peaceful assembly. In a series of cases, this Court has addressed the problems posed by threats to public order from counter-demonstrations. Any legitimate ground for restriction must still meet the requirement of being "necessary in a democratic society," one whose hallmarks are pluralism, tolerance, and broadmindedness.[27] The Court has emphasized the importance of freedom of association for minorities.[28] Thus it has held that "democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."[29]

Minorities include people of diverse sexual orientations and gender identities. In *Baçzkowski v. Poland*, which concerned the denial of a parade permit to an LGBT organisation, the Court stated that the positive obligation of the state to secure the effective enjoyment of the freedom of association and assembly is "of particular importance for persons holding unpopular views

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[23] *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), at para. 8.6.
[24] *Open Door and Dublin Well Woman v. Ireland*, Application no. 14234/88; 14235/88, Judgment dated 29 October 1992, at para. 65.
[25] Id. at para. 68.
[26] Id. at para. 71.
[27] *Barankevich v. Russia*, Application No. 10519/03, Judgment dated 26 July 2007, at para. 30; *Gorzelik and Others v. Poland*, Application no. 44158/98, Judgment dated 17 February 2005, at para. 90.
[28] *Gorzelik and Others v. Poland*, Application no. 44158/98, Judgment dated 17 February 2004, at para. 93.
[29] *Young, James and Webster v. United Kingdom*, Application No. 7601/76; 7806/77, Judgment dated 13 August 1981, at para. 63.

or belonging to minorities, because they are more vulnerable to victimisation."[30] The Court concluded that the interference with the applicants' right to freedom of peaceful assembly had not been prescribed by law.

Furthermore, the freedom of peaceful assembly includes assemblies that express opinions on "highly controversial issues."[31] The state's duty to protect "extends also to a demonstration that may *annoy* or *give offence* to persons opposed to the ideas or claims that it is seeking to promote."[32] "If every probability of tension and heated exchange between opposing groups during a demonstration was to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing different views."[33] In *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* and reiterated elsewhere, the Court emphasized: "Sweeping measures of a preventive nature to suppress freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities, and however illegitimate the demands made may be – do a disservice to democracy and often even endanger it."[34]

Third, it is clear that public morality cannot be used in a discriminatory fashion against individuals on the basis of their sexual orientation. The OSCE Guidelines on Freedom of Peaceful Assembly state: "There should be a requirement of state neutrality that precludes moral judgments on, for example, preferences for any sexual orientation over another."[35] Committee of Ministers Recommendation (2010) 5 affirms the principle that "neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."[36] Similarly, in the domestic challenge to the ban on the Warsaw Equality Parade, the Constitutional Court of Poland noted: "Freedom of assembly is a constitutional value and not a value defined by the democratically legitimized political majority in power at a certain moment in time. . . The moral views of the holders of political power are not synonymous with 'public morals' as a premise for limiting freedom of assembly."[37] The Human Rights Committee decision in *Toonen v. Australia* as well as this Court's judgments in *Dudgeon v. United Kingdom*, *Norris v. Ireland*, and *Modinos v. Cyprus* all reassert this principle.[38]

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[30] *Baçzkowski and Others v. Poland*, Application no. 1543/06, Judgment dated 3 May 2007, at para. 64.
[31] *Plattform Arzte Fur Das Leben v. Austria*, Application no. 10126/82, Judgment dated 21 June 1988, at para. 32.
[32] *Ollinger v. Austria*, Application no. 769/00, Judgment dated 29 June 2006, at para. 36 (emphasis added).
[33] Id.
[34] *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Application No. 29221/95 and 29225/95, Judgment dated 2 October 2001, at para. 97: see also *Association of Citizens Radko & Paunkovski v. FRY Macedonia*, Application no. 74651/01, Judgment dated 15 January 2009, at para. 76.
[35] OSCE, Guidelines on Freedom of Peaceful Assembly (Warsaw 2007) at para. 69.
[36] Recommendation CM/Rec (2010) 5, adopted 31 March 2010.
[37] Constitutional Court of Poland, Requirement to Obtain Permission for an Assembly on a Public Road, 18 January 2006, at paras. 3-4.
[38] *Dudgeon v. United Kingdom*, Application no. 7525/76, Judgment dated 22 October 1981; *Norris v. Ireland*, Application no. 10581/83, Judgment dated 26 October 1988: *Modinos v. Cyprus*, Application no. 15070/89, Judgment dated 22 April 1993.

The risk, for either a court or a legislator, is the very real possibility that both public morality and public order justifications might amount to nothing more than expressions of hostility, dislike or prejudice on the part of a sector, perhaps even the majority, of the public. Thus public morality and related public order justifications must be cabined in their application so that they cannot function as judicially-sanctioned proxies for prejudicial public opinion.

III. Public Morality Insufficient as a Justification for Disparate Treatment in ECHR and Comparative Case-Law

III.A. The Jurisprudence of the European Court of Human Rights

Article 14 prohibits discrimination in the enjoyment of any Convention rights or freedoms. This Court has held that differences in treatment must have objective and reasonable justifications or else they will be considered prohibited discrimination. An "objective and reasonable justification" means that the justification must not only pursue a "legitimate aim" but must also have a "reasonable relationship of proportionality between the means employed and the aim sought to be realized."[39] In the case of distinctions based on sexual orientation, the Court has required "particularly serious reasons by way of justification."[40]

This Court has not directly confronted the use of public morality as a reason for a difference in treatment. However, it has addressed issues of public prejudice in relation to bans on gays and lesbians serving in the military and unequal ages of consent for sexual activity. In the case of *Lustig-Prean and Beckett v. United Kingdom*, for example, the government did not directly assert public morality as a justification. It did, however, refer to a study that found "negative attitudes of heterosexual personnel towards those of homosexual orientation."[41] The Court found this justification lacking.

> To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.[42]

The same reasoning was used in cases concerning Article 209 of the Austrian Criminal Code, which imposed a higher age of consent for same-sex sexual conduct than for opposite-sex sexual conduct. In both *S.L. v. Austria* and *L. and V. v. Austria*, this Court found violations of Article 14 of the Convention.[43]

III.B. The Jurisprudence of National Courts

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[39] *Unal Tekeli v. Turkey*, Application no. 29865/96, Judgment dated 16 November 2004, at para. 50.
[40] *S.L. v. Austria*, Application no. 45330/99, Judgment dated 9 January 2003, at para. 24; *Karner v. Austria*, Application no. 40016/98, Judgment dated 24 July 2003, at para. 34; *Kozak v. Poland*, Application no. 13102/02, Judgment dated 2 March 2010, at para. 92.
[41] *Lustig-Prean and Beckett v. United Kingdom*, Application nos. 31417/96 and 32377/96, Judgment dated 27 September 1999, at para. 89; see also *Smith and Grady v. United Kingdom*, Application nos. 33985/96; 33986/96, Judgment dated 27 September 1999, at para. 97 (same).
[42] *Lustig-Prean and Beckett* at para. 90.
[43] *S.L. v. Austria*, Application no. 45330/99, Judgment dated 9 January 2003, at para. 44 (same); *L. and V. v. Austria*, Application nos. 39392/98 and 39829/98, Judgment dated 9 January 2003, at para. 52 (same).

The intersection of public morality and non-discrimination has been squarely addressed by a number of courts around the world. Their jurisprudence establishes that public morality, without more, cannot serve to defend discrimination that is based on sexual orientation.

In the case of *Romer v. Evans*, the U.S. Supreme Court struck down a state constitutional amendment that had the effect of removing gays and lesbians from the protection of anti-discrimination laws. The state, and the dissent by Justice Scalia, argued that the amendment was a "reasonable effort to preserve traditional American moral values."[44] According to Justice Scalia, "the only sort of 'animus' at issue here [was] moral disapproval of homosexual conduct," and this was a permissible basis for legislation.[45] The majority opinion found otherwise: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[46]

Seven years later the U.S. Supreme Court invalidated a state statute criminalizing same-sex sexual conduct on privacy grounds in the case of *Lawrence v. Texas*. Texas had argued that the law "furthers the legitimate governmental interest of the promotion of morality."[47] Justice O'Connor wrote a separate concurrence based on equal protection.[48] She emphasized that "[m]oral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."[49] Behind the moral justification for the law, she perceived "a statement of dislike and disapproval against homosexuals," which could not qualify as a legitimate state interest.[50]

In South Africa, in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court considered whether public morality was an appropriate justification for a law criminalizing sodomy. The Court determined that "[t]he enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose."[51]

In July 2009, in the case of *Naz Foundation v. Union of India*, the High Court of Delhi rejected claims that public morality justified Section 377 of the Indian Penal Code, which criminalized consensual same-sex sexual activity:

> The argument of the learned ASG [Assistant Solicitor General] that public morality of homosexual conduct might open floodgates of delinquent behavior is not founded

[44] *Romer v. Evans*, 517 U.S. 620, 651 (Scalia, J., dissenting) (1984).
[45] Id. at 644 (Scalia, J., dissenting).
[46] Id. at 634.
[47] *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).
[48] Equal protection analysis under the U.S. Constitution is analogous to the non-discrimination provision of the Convention. See Council of Europe, Explanatory Report to Protocol 12 at para. 15 ("While the equality principle does not appear explicitly in the text . . . , it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists.").
[49] Id. (O'Connor, J., concurring).
[50] Id. at 583 (O'Connor, J., concurring).
[51] *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, [1998] ZACC 15, at para. 37.

> upon any substantive material, even from such jurisdictions where sodomy laws have been abolished. Insofar as basis of this argument is concerned, as pointed out by Wolfenden Committee, it is often no more than the expression of revulsion against what is regarded as unnatural, sinful or disgusting. Moral indignation, howsoever strong, is not a valid basis for overriding individuals's fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.[52]

As for the right to equality under Article 14 of the Indian Constitution, the High Court stated: "Public animus and disgust towards a particular social group or vulnerable minority is not a valid ground for classification under Article 14. Section 377 [Indian Penal Code] targets the homosexual community as a class and is motivated by an animus towards this vulnerable class of people."[53] Although the Union of India argued that the objective of Section 377 was in part to "enforce societal morality against homosexuality," the Court found this unpersuasive.[54] Rather, Section 377 "has no other purpose than to criminalize conduct which fails to conform with the moral or religious views of a section of society" and was thus discriminatory.[55]

In the Philippines, the Supreme Court considered a petition for writ of *certiorari* from Ang Ladlad, an organization that had been denied permission to register as a political party by the Commission on Elections ("COMELEC"). The decision of COMELEC had been based on its view of public morality. The Supreme Court held:

> "[M]oral disapproval, without more, is not a sufficient governmental interest to justify exclusion of homosexuals from participation in the party-list system. The denial of *Ang Ladlad*'s registration on purely moral grounds amounts more to a statement of dislike and disapproval of homosexuals, rather than a tool to further any substantial public interest. Respondent's blanket justifications give rise to the inevitable conclusion that the COMELEC targets homosexuals themselves as a class, not because of any particular morally reprehensible act. It is this selective targeting that implicates our equal protection clause."[56]

The Supreme Court questioned whether the public morality referred to by the Commission even existed and then added: "Indeed, even if we were to assume that public opinion is as the COMELEC describes it, the asserted state interest here – that is, moral disapproval of an

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[52] *Naz Foundation v. Union of India*, WP(C) No.7455/2001, 2 July 2009, at para. 86. The Wolfenden Committee Report, issued in 1957, recommended amending criminal law in England and Wales to remove provisions criminalizing sexual acts between consenting adult men. The report based its conclusions on the premise that, even if society viewed such sexual practices as immoral, they were still beyond the proper reach and function of criminal law. Perhaps the most famous quote from the Wolfenden Report is the following: "[T]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."

[53] Id. at para. 91.

[54] Id. at para. 92.

[55] Id. at 92.

[56] *Ang Ladlad LGBT Party v. Commission on Elections*, Supreme Court of the Philippines, 8 April 2010 (en banc) at 13.

unpopular minority – is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause."[57]

Similar decisions regarding the role of public morality have been reached by courts in Hong Kong and Fiji. In these cases, the courts rejected the contention that public morality could serve to justify disparate treatment of individuals based on their sexual orientation. In the case of *Leung v. Secretary for Justice*, the High Court of the Hong Kong Special Administrative Region observed that when fundamental human rights are at issue, such rights "are not easily set aside because the majority wishes it."[58] In the case of *Secretary for Justice v. Yau Yuk Lung and Another*, the appellant argued that the court should defer to the legislature on moral issues. The Court, in response, explained that "conservatism may in fact be unacceptable entrenched prejudice." Quoting Professor Ronald Dworkin, the Court noted that "the principles of democracy we follow do not call for the enforcement of a consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom, itself occupies a critical and fundamental position in our popular morality."[59]

Finally, in the case of *Nadan & McCoskar v. State*, the High Court of Fiji recognized that there was a "genuine and sincere conviction shared by a large number of responsible members of the Fijian community that any change in the law to decriminalize homosexual conduct would seriously damage the moral fabric of society. . . . However, while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law."[60]

IV. Conclusion

The unease that judicial bodies experience when encountering justifications based on public morality is a function in part of the vagueness of the concept. Who is the public and what is morality? The very imprecision of the contours of public morality make it impossible to determine whether and when it is a mask for unacceptable prejudice. Yet even if public morality were capable of precise definition, it would still have to be rejected as a justification for a difference in treatment. Public morality is based on majority opinion and as such it poses a particular threat to unpopular minorities.

Although the protection of morals is, subject to conditions, a permissible limitation on some Convention rights, public morality alone is not an objective and reasonable justification for a difference in treatment. Indeed, because public morality is often indistinguishable from popular prejudice, it requires an especially vigilant judicial response. The guarantee of Article 14 means that "public morality" cannot be used as a reason to deny any individual the enjoyment of the rights and freedoms set forth in the Convention.

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[57] Id.
[58] *Leung v. Secretary for Justice*, HCAL 160/2004, at para. 123.
[59] *Secretary for Justice for Yau Yuk Lung and Another*, (2006) 4 HKLRD 196, at 202 (quoting Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, in Yale Law Journal, May 1966, at 1001).
[60] *Nadan & McCoskar v. State,* High Court of Fiji at Suva, 26 August 2005.